

1 DAVID R. EBERHART (S.B. #195474)
deberhart@omm.com
2 SHARON M. BUNZEL (S.B. #181609)
sbunzel@omm.com
3 COLLEEN M. KENNEDY (S.B. #227107)
ckennedy@omm.com
4 O'MELVENY & MYERS LLP
Two Embarcadero Center, 28th Floor
5 San Francisco, CA 94111
Telephone: (415) 984-8700
6 Facsimile: (415) 984-8701

Attorneys for Plaintiff eBay Inc.

**UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN JOSE DIVISION**

EBAY INC.,

Plaintiff,

V.

DIGITAL POINT SOLUTIONS, INC.,
SHAWN HOGAN, KESSLER'S
FLYING CIRCUS, THUNDERWOOD
HOLDINGS, INC., TODD DUNNING,
DUNNING ENTERPRISE, INC., BRIAN
DUNNING, BRIANDUNNING.COM,
and DOES 1-20.

Defendants.

Case No. C 08-04052 JF

**OPPOSITION OF EBAY INC. TO
DEFENDANTS' REQUESTS FOR
JUDICIAL NOTICE**

Hearing Date: December 12, 2008
Time: 9:00 a.m.
Judge: Hon. Jeremy Fogel

1

2 **I. INTRODUCTION**

3 The requests for judicial notice filed by Defendants Todd Dunning and Dunning
4 Enterprise, Inc.; Thunderwood Holdings, Inc., Brian Dunning, and BrianDunning.com;
5 Shawn Hogan and Digital Point Solutions, Inc.; and Kessler's Flying Circus overreach the
6 limits imposed by Federal Rule of Evidence 201 and should be denied. Rule 201 allows
7 judicial notice only of adjudicative facts not subject to reasonable dispute. Fed. R. Evid.
8 201(a), (b). Although notice is proper as to the fact that certain documents exist—either
9 filed in another court or with the Secretary of State—Rule 201 prohibits any notice or
10 inference as to the truth of any disputed statements or factual representations included in
11 those documents. Because the contents of the documents submitted by Defendants are
12 subject to dispute, judicial notice is inappropriate.

13

14 **II. ARGUMENT**

15

16 **A. The KFC Defendants Have Inappropriately Requested Judicial Notice**
17 **Of Disputed Facts.**

18 Defendants Todd Dunning, Dunning Enterprise, Inc., Thunderwood Holdings, Inc.,
19 Brian Dunning, BrianDunning.com, and Kessler's Flying Circus (collectively, "the KFC
20 Defendants") have each requested judicial notice of facts included in several filings in the
21 unrelated action *Commission Junction, Inc. v. Thunderwood Holdings, Inc. et al.*, Case
22 No. 30-2008-00101025 (Orange County, California Superior Court). The KFC
23 Defendants have attempted to use the contents of these filings: to prove that defendant
24 KFC was an affiliate advertiser for eBay pursuant to the Publisher Service Agreement
25 between KFC and Commission Junction ("CJ") (T. Dunning Mot. at fn. 2, 4); to
26 demonstrate that eBay, purportedly through CJ, made conflicting allegations related to
27 KFC's alleged cookie stuffing activities (*id.* at fn. 7); and to illustrate the supposed
28 similarities between the two cases (KFC Mot.¹ at 5; B. Dunning Mot. at 9), among other
disputed facts. Although the Court is permitted, but not required, to take judicial notice of

1 ¹ Although KFC cites to a Request for Judicial Notice in its Motion to Dismiss, no such notice or
request for judicial notice appears to have been filed.

1 the fact that another case exists, it is improper to accept as true the facts and matters stated
2 within documents filed in that action. *See Bias v. Moynihan*, 508 F. 3d 1212, 1225 (9th
3 Cir. 2007) (accepting judicial notice of the existence of prior cases involving the litigant);
4 *San Luis v. Badgley*, 136 F. Supp. 2d 1136, 1146 (E.D. Cal. 2000) (holding that a court
5 “may take judicial notice of a document filed in another court not for the truth of the
6 matters asserted in the litigation, but rather to establish the fact of such litigation and
7 related filings”) (citations omitted); *see also Liberty Mutual Ins. Co. v. Rotches Pork
8 Packers, Inc.*, 969 F.2d 1384, 1388-89 (2d Cir. 1992). Where, as here, a party requests
9 judicial notice of the contents of unrelated court filings in order to refute the allegations of
10 a plaintiff’s complaint—allegations which must be accepted as true on a motion to
11 dismiss—judicial notice must be denied. *See United States v. Jones*, 29 F.3d 1549, 1553
12 (11th Cir. 1994).

13 **B. Articles of Incorporation May not be Judicially Noticed to Prove that**
14 **DPS Cannot be Sued for Actions Predating May 2007.**

15 DPS’s contention that it “did not exist until May 14, 2007” (DPS Mot. at 2) may
16 not be established by its request for judicial notice. eBay opposes DPS’s request for
17 judicial notice for the reasons set forth in its Opposition to DPS’s and Shawn Hogan’s
18 Partial Motion to Dismiss, which are hereby incorporated by reference. (DPS/Hogan
19 Opposition at 2-4).

20 **III. CONCLUSION**

21 For the reasons set forth above, eBay respectfully requests that the Court deny
22 Defendants’ requests for judicial notice.

23 DATED: November 21, 2008

DAVID R. EBERHART
SHARON M. BUNZEL
COLLEEN M. KENNEDY
O’MELVENY & MYERS LLP

26 By: /s/ David R. Eberhart
27 DAVID R. EBERHART
28 Attorneys for Plaintiff eBAY INC.